In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 140

WILLIAM EARL BIGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 421 F. 2d 1344.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1970. A petition for rehearing was denied on March 2, 1970. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to May 1, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

389-832—70

QUESTIONS PRESENTED

1. Whether an issue of unlawful entrapment was raised by the evidence.

2. Whether the petit jury was unlawfully selected.

3. Whether the court of appeals could properly decline to review petitioner's attack on the evidence sustaining his conviction on the conspiracy count and choose to apply the concurrent sentence doctrine as a matter of judicial convenience.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted under a three-count indictment of possessing counterfeit money on August 23, 1965, selling the money on that date, and conspiring from April 15 to August 24, 1965 to possess and pass false notes, in violation of 18 U.S.C. 472, 473 and 371, respectively. He received a five-year sentence on each count, the terms to run concurrently. The court of appeals affirmed (Pet. 12-15).

The evidence showed that on August 20, 1965, Secret Service agents arrested one Donald Westmoreland in possession of a quantity of counterfeit ten dollar Federal Reserve notes. Westmoreland told the agents that he had obtained counterfeit money from petitioner in late May or early June. Following his arrest, he agreed to cooperate with the federal officers (R. 21, 30).[1]

[1] "R." refers to Volume 1 of the two-volume record filed with the Clerk of this Court.

On August 22, 1965, Westmoreland, in the presence of agent Quinn, called petitioner and arranged for a meeting that day at a motel in Gainesville, Florida (R. 18). At the meeting, he introduced Quinn as "Dick Johnson from Atlanta, Georgia," and indicated that Quinn was interested in purchasing counterfeit currency (R. 4–5). Petitioner offered to sell Quinn $100,000 of counterfeit currency for $15,000 and, upon payment within ten days, an additional $100,000 of counterfeit currency for $10,000. On August 23, as prearranged the day before, petitioner gave Quinn and Westmoreland a key to a bus terminal locker which contained an envelope holding five sample false notes (R. 6). Quinn informed petitioner that the notes were satisfactory, and agreed to consummate the sale. That evening, the parties met at a restaurant in Lake City, Florida. Petitioner directed Quinn to follow him to a nearby motel, indicating that the counterfeit currency was hidden under a bed in a motel room (R. 8–9). Petitioner then gave Quinn the key to the room and Quinn found the currency where petitioner had designated (R. 10–11). Returning to petitioner, who had been waiting outside, Quinn handed petitioner a key stating that the payoff money had been placed in a bus station locker. The locker contained a dummy package placed there by other agents. Petitioner and his co-defendant, one Shelby Thrift, were arrested as they left the bus station carrying the decoy package.

ARGUMENT

1. Contrary to petitioner's contention, an issue of unlawful entrapment was not raised here by the in-

troduction of evidence showing that Westmoreland, after agreeing to assist federal agents, initiated the dealings between petitioner and agent Quinn through his telephone call to petitioner and his representation that Quinn was a buyer of bogus money. Whatever differences courts may have in their treatment of the defense of entrapment, they are unanimous in holding that the entrapment issue need not be presented to the jury if uncontradicted proof has established that the defendant was ready and willing without persuasion to commit the offense and the government merely afforded the opportunity and facilities for its commission. *Sorrells* v. *United States*, 287 U.S. 435, 441; *Lopez* v. *United States*, 373 U.S. 427, 436; *Lewis* v. *United States*, 385 U.S. 206, 208. Precisely that situation was presented here. Accordingly, both courts below correctly concluded that an entrapment instruction was not warranted. *United States* v. *Henry*, 417 F. 2d 267 (C.A. 2), certiorari denied, 397 U.S. 953; *Pierce* v. *United States*, 414 F. 2d 163 (C.A. 5), certiorari denied, 396 U.S. 960.

2. Since the trial occurred before the effective date of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861, the issue raised by petitioner regarding the composition of the jury is of no general import. In any event, the manner of selection of the petit jurors here provides no basis for a claim of denial of due process. The names of prospective jurors were drawn from a box containing the names of qualified persons in the Jacksonville Division of the Middle District of Florida. Of 85 individuals chosen, all but one were

residents of Duval County, by far the most populous county, which includes the city of Jacksonville. There was, however, no systematic exclusion of any recognized class of individuals, nor was the manner of selection violative of any statutory scheme. Morover, no rule has ever required that each petit jury contain at least one resident of the same county as the defendant, particularly where, as here, that county is so sparsely populated. See *Rabinowitz* v. *United States,* 366 F. 2d 34 (C.A. 5); *Salary* v. *Wilson,* 415 F. 2d 467 (C.A. 5).

3. Since identical concurrent sentences were imposed for the three offenses charged, and all offenses arose from a single course of events—with no one offense suppling unique or aggravating circumstances likely in itself to influence the length of the sentence—the court of appeals could properly make a discretionary choice (for reasons of judicial convenience) to decline to review petitioner's attack on the sufficiency of evidence supporting his conviction on the conspiracy count. See *United States* v. *Barsaloux,* 419 F. 2d 1299, 1300 (C.A. 5), certiorari denied, 397 U.S. 972. Even if we were to assume otherwise, the record in this case clearly supports the petitioner's conviction on the conspiracy count, the acquittal of the only other named co-conspirator notwithstanding.[2] See *Rogers* v. *United States,* 340 U.S. 367, 375.[3]

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[2] The count charged petitioner with conspiring with one Shelby Thrift "and with diverse other persons whose names are to the Grand Jury unknown * * *." Thrift, tried jointly with petitioner, was acquitted by the court at the end of the government's case.

[3] Petitioner misreads the State law in claiming that he has

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

JULY 1970.

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three convictions as a result of this case, and that a fourth will subject him to a sentence of mandatory life imprisonment (Pet. 11). The Florida Supreme Court, interpreting that State's recidivist statute in *Hodges* v. *Mayo*, 65 So. 2d 750, has stated that each of the four convictions underlying the mandatory sentence must be for separate offenses, and "no two convictions could be had on any one day."

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